



NAC

Environment and Trade Working Together

U.S. National Advisory Committee
*Independent Federal Advisors
on the North American
Agreement on Environmental Cooperation*

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The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

The National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its thirty third meeting on October 14 and 15, 2009, in Burlington Vermont.

We wish to thank your staff as well as Jeff Wennberg, Chairman of the Government Advisory Committee (GAC) for excellent organization, preparation and logistics for the meeting. Materials provided by EPA in anticipation of the meeting prepared our committee well and the agenda was well designed.

During the meeting we were informed of a broad range of environmental issues, programs and progress at the border between the United States and Canada. We appreciate the presentations made, by Justin Johnson, Commissioner of the Vermont Department of Environmental Conservation, John Shea, of the New England Governor's Conference, Ted Diers, of the New Hampshire Coastal Program and Harold Garabedian from the U.S.-Canada International Joint Commission. It was also great to have the participation of Ms. Kate Renahan and Ms. Kelsey O'Neil from EPA's New England Regional Office at our meeting.

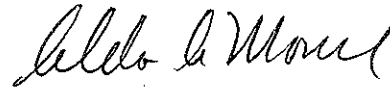
We are also grateful for the candid update from Sylvia Correa about the status of the CEC. Our discussions at the meeting and the following advice address the "Proposal to Examine the Governance of the CEC and the Implementation of the NAAEC" dated September 17, 2009.

Finally, we also extend our gratitude to Rafael DeLeon, Mark Joyce, Oscar Carrillo, Stephanie McCoy and Lois Williams from the EPA Office of Cooperative Environmental Management for organizing and staffing this meeting.

We hope this advice will be of use to you and other US government officials as we continue to think about how best we can support the CEC in achieving its mission.

Thank you for the opportunity to advise you on these matters.

Very truly yours,



Aldo A. Morell
Acting Chair, National Advisory Committee

cc: Michelle DePass, Assistant Administrator, EPA, Office of International Affairs
Rafael DeLeon, Director, Office of Cooperative Environmental Management
Sylvia Correa, Senior Advisor for North American Affairs, OIA
Oscar Carrillo, Designated Federal Officer, OCEM
Jeff Wennberg, Chair, U.S. Governmental Advisory Committee
Nelly Correa, Chair, Joint Public Advisory Committee
Evan Lloyd, Interim-Executive Director, CEC

Members of the U.S. National Advisory Committee:

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|------------------|----------------|
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National Advisory Committee
To the U.S. Representative to the
Commission for Environmental Cooperation

**Advice 2009-4 (October 26, 2009): Response to EPA's request for input regarding the Draft
CEC Governance Proposal Sections 2 and 3;
*The Secretariat's Functional Model and Structure***

In preparation for our meeting and discussions on October 14th and 15th in Burlington, Vermont, the NAC reviewed both the Ministerial Statement for the 2009 Council Session, and the draft Governance proposal drawn up to reflect the ministers commitment to "renew, revitalize and refocus the CEC." While we were also asked to review the *Draft CEC Operational Plan for 2010*, we were then informed at our meeting that the Operational Plan had been rejected by the Administrator and sent back to the Secretariat for re-write.

It seemed to the NAC that the development of the Governance Proposal was occurring during roughly the same time frame, but independent of, the development of the Secretariat's Operational Plan, and as such each document might better align as they are both being further developed and refined. As a result the NAC chose to focus much of its discussion and advice on the Governance Proposal.

As requested in the Charge Questions, the NAC considered whether the Governance proposal enhanced "accountability and transparency," and alignment with the Ministerial Statement.

The NAC agrees with the objective and rationale presented in the draft Governance proposal (September 17, 2009) to examine and adjust the functional model and structure of the Secretariat so that it can focus its resources on those activities that can best support the Council's priorities and the intent of the enabling agreement. To accomplish this, the parties will need to define and agree on the scope of the technical, administrative and operational support they want provided by the Secretariat. A well defined and articulated mission for the Secretariat is critical to ensure any functional or organizational changes yield the desired results.

In order for the Council to understand what the Secretariat is doing on a day-to-day basis to achieve the Council's goals, the NAC believes it is important to improve transparency and communication between the Executive Director and the Council. Consequently, the Council should establish clear performance goals and measures for the Executive Director and the Secretariat as a whole. Such goals and measures can provide the backbone to ensuring accountability and alignment between the Secretariat and the Council.

Once performance goals and measures are established however, the Council needs to rely on the Executive Director to manage the operations of the Secretariat, so it is equally important that the Council does not hinder the day to day operations of the Secretariat by establishing overly restrictive procedures, oversight, and approvals.

There are many effective organizations that the Council can use as models in establishing an organizational and functional structure for the Secretariat. Other conventions and agreements among nations have Executive Directors and Secretariats. Trade associations represent various businesses and NGOs as they work to carry out their missions. As changes in the organizational design are considered, the Council might reference Business Process Reengineering (BPR) techniques, which emphasize "lean thinking" for process improvement tools. These tools and

mindset have been used successfully in manufacturing/ production operations, and have also been adapted for use in office environments. Michael Hammer and James Champy's book, "Reengineering the Corporation" suggests seven principles of reengineering to streamline the work process:

1. Organize around outcomes, not tasks.
2. Identify all the processes in an organization and prioritize them in order of redesign urgency.
3. Integrate information processing work into the real work that produces the information.
4. Treat geographically dispersed resources as though they were centralized.
5. Link parallel activities in the workflow instead of just integrating their results.
6. Put the decision point where the work is performed, and build control into the process.
7. Capture information once and at the source.

At this point, the NAC does not have enough information from the draft Governance proposal to determine if or suggest that a radical redesign of the secretariat is appropriate. We believe that any type of reorganization will benefit from a "fresh eyes" perspective and using the techniques mentioned above as much as possible.

On page 2 (*Description of issues to be examined*) and page 3 (*Preliminary Assessment*) of the Governance Proposal, the NAC notes that the document emphasizes the Secretariat's role in supporting and facilitating the work of the Parties rather than managing projects. While this emphasis seems to accurately reflect the tone of the Ministerial Statement, the NAC cautions that in our past advice and in our current thinking, the Secretariat should not be hampered in its ability to execute core functions, such as Article 13, 14, and 15. While the NAC does not view these core functions to be independent of Council priorities, the NAC does believe that the Secretariat should have some independence in deciding how it carries out these core functions. For example, the Secretariat should be able to rely on expert, unbiased technical support from outside the organization with regard to Article 13 reports and data gathering to support the development of Factual Records.

Recommendations:

1. ***The NAC recommends that when considering alternate operational models for the Secretariat, the United States could reference and benchmark with other convention secretariats, such as the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), to determine if there are operational characteristics that could be replicated by the Secretariat. It might also be useful to examine the operation models of some trade associations and/or NGO's.***
2. ***The NAC recommends that the Secretariat Executive Director should be provided a set of performance objectives based on the priorities of the Council when his/her term begins. The Council should review the performance vs. objectives on an annual basis. The Executive Director should establish performance goals for the staff in line with the annual workplan and Council objectives and review these annually.***
3. ***The NAC recommends that changes to the Functional Model and Structure of the Secretariat should utilize BPR and Lean Thinking techniques that have been proven successful in industry. A wide varieties of tools and activities are available that could guide the Council as they determine how to best strengthen the Secretariat's support and coordination function. The use of specialists in organizational transformation should also be considered.***

National Advisory Committee
To the U.S. Representative to the
Commission for Environmental Cooperation

**Advice 2009-5 (October 26, 2009): Regarding the Draft CEC Governance Proposal:
Additional Changes to Strengthen CEC and NAAEC;
*Streamlining the Cooperative Work Program***

With regard to Streamlining the Cooperative Work Program (p. 4 of the Governance Proposal), the NAC supports a “sunset assessment” for determining which projects might no longer fit new priorities stemming from the desired outcomes of the Denver Council Session. NAC also supports the incorporation of project selection criteria as a guide for determining individual projects that are relevant to the three countries, especially given the fact that even while new priorities emerged from the Council Session, those priorities continue to be broad enough to support a wide variety of projects being included in the Secretariat’s workplan. The Governance Proposal references project selection criteria that were created in 2008. While the NAC has not been supplied with a copy of the selection criteria, nor do they appear to be available on the CEC website, we suggest that some elements of the criteria might include the following:

- A time frame with a clear beginning and endpoint to the project
- Ensures meeting goals of assisting communities and people
- Addresses a critical trade and environment issue agreed upon by the Council
- Addresses an identified need (such as data required for informing/advancing a project)
- Adheres to a trilateral lens, e.g. is a niche that CEC is best equipped to fill
- Supplies information, training, support, or technical guidance not otherwise available and/or enables the development of these components

Germaine to this next paragraph, the NAC notes that our advice letter of June 12th was largely devoted to addressing a response to EPA’s request for feedback on restructuring the CEC. Much time and effort was spent on crafting a response that would adequately reflect our group discussion on the topic. At that time, the NAC was provided a copy of the Stratos Report entitled “Review of CEC Secretariat Options,” about which the NAC had a number of comments. The Governance Proposal, however, references an entirely different document commissioned by the Secretariat and completed by the Eastern Research Group. The NAC was not provided with a copy of the ERG report. As we stated in our June 12 advice letter, we felt the Stratos report was inadequate in summing up the options available for restructuring the Secretariat, and we would hope that the ERG report might offer greater insight. It would be helpful to be able to review this report once completed, if the report is still in draft form.

The NAC supports the reestablishment of the community grants program known in the past as the North American Fund for Environmental Cooperation. Our advice and our discussions as a group have encouraged the reestablishment of the NAFEC. The NAC also supports establishing project selection criteria for NAFEC projects to ensure alignment with current priorities.

The reestablishment of the NAFEC should not, however, detract from the core functions of the CEC Secretariat, especially if the Governance proposal authors envision diverting funds from the existing operational budget of \$9 million to fulfill funding for NAFEC projects.

Recommendations:

- 1. The NAC recommends that the United States should support “sunset assessment” for projects and should seek to establish clear project selection criteria as an important, objective tool by which projects will be deemed appropriate.***
- 2. The NAC supports reinstating the NAFEC but not at the expense of the current core functions of the Secretariat especially vis a vis Articles 13, 14 and 15, and other operational needs.***

National Advisory Committee
To the U.S. Representative to the
Commission for Environmental Cooperation

**Advice 2009-6 (October 26, 2009): Response to EPA's
Proposal to "Modernize the SEM Process"**

The United States has proposed to "modernize" the process for Submissions on Enforcement matters (SEM) under Articles 14 and 15 of the NAAEC. The proposal submitted by the United States suggests that the main problems lie within the Secretariat by suggesting that the lack of timely processing of citizens submissions is related to the failure to allow email submissions. The proposal also characterizes the citizens' submission process as one that "facilitates understanding of environmental law and the enforcement policies of the Parties, and supports NAAEC objectives to promote public participation in the domestic enforcement process."

The NAC has consistently raised concerns about implementation of the SEM process by Council and the Parties and offered recommendations to address these concerns. As noted in our letter of advice from October 2007:

"Despite the importance of the submissions process, the NAC, JPAC, and the Independent Review Committees have felt compelled to offer repeated advice to the United States to implement the citizen submissions process in light of the spirit and letter of the NAAEC."

The NAC believes the current proposal fails to capture these concerns adequately, and, additionally, mischaracterizes the purpose of this process. The process is not intended to facilitate an understanding of environmental law and enforcement policies, but to motivate Parties to better enforce their environmental laws.

In addition, while staffing levels have sometimes led to delays in the processing of submissions by the Secretariat, and allowing submissions by email would facilitate the SEM process, the main problem concerning a lack of timeliness of the process lies with the Council. The NAC has repeatedly expressed concerns related to the failure of the Council to respond promptly to recommendations of the Secretariat to prepare factual records.

As noted in the October 2007 letter of advice:

"The failure of the United States and Council to support the citizen submission process through timely votes on recommendations of the Secretariat is especially discouraging in light of the repeated requests from the United States to the NAC over the last two years for advice on how to make the CEC more relevant."

In this letter, the NAC offered two specific recommendations to address this concern:

"Recommendation: The NAC recommends that the United States support the development of factual records concerning enforcement efforts of the United States and take a vote to approve the development of such factual records at the first alt reps meeting following the publication of the recommendation from the Secretariat to prepare a factual record."

Recommendation: The NAC recommends that the United States propose a rule, to be adopted by Council, which directs Council to vote on recommendations of the Secretariat to prepare factual records within 90 days of the recommendation.”

Another frequently expressed concern relates to the delay in voting to disclose factual records that have been prepared by the Secretariat. Another way to modernize the SEM process would be to require a vote on disclosure of factual records at the next CEC-related meeting.

Finally, the NAC has proposed that the process incorporate a non-adversarial, cooperative mechanism for the resolution of environmental problems identified by citizens. This “problem-solving” process would allow citizens to approach an independent Secretariat with issues unrelated to enforcement failures and would not seek to assign blame for the specified environmental concern. Instead, the process would help resolve environmental problems.

Our advice letter notes:

“[T]he Secretariat would work with the requestors and the Party or Parties concerned to resolve the issue. The Secretariat’s functions would vary depending on the nature of the issue. It would seek to identify technology, information, financing, or other resources and catalyze resolution of the problem. (Those resources could be available through governments, businesses, academic institutions, non-profit institutions, international organizations, etc.) In some cases, it might simply pass on such information to the requestors; in others, it might facilitate direct contacts between the requestors and other interested parties; in still others, it might prepare a short report outlining an approach that all interested parties might consider taking. Finally, in some cases it might determine after further consideration that it cannot assist with resolution of the problem.”

At its core, this proposal attempts to address the central issues that matter to citizens: that their voices are heard and that officials respond to their concerns in a meaningful way. The proposal upends the nature of the citizen submission process by altering the nature of the process. Instead of an allegation that the government has failed to enforce environmental law, the process seeks ways to resolve specific environmental concerns. As such, the proposal would help renew the spirit of cooperation that has been lost in the NAAEC.

Recommendations:

- 1. The NAC stands by our advice from previous letters referenced in the above section.***
- 2. The NAC recommends that the United States propose establishing a process within the SEM that incorporates a non-adversarial, cooperative mechanism for the resolution of environmental problems identified by citizens. The Council could use its authority under Article 10(1)(b) to pursue this worthwhile approach to modernizing the SEM process.***

National Advisory Committee
To the U.S. Representative to the
Commission for Environmental Cooperation

**Advice 2009-7 (October 26, 2009): Response to EPA's Proposal to Complete Negotiations
for a Transboundary Environmental Impact Assessment Agreement**

The NAC supports the efforts of the United States and Council to complete negotiations for a transboundary environmental impact assessment (TEIA) agreement. Such an agreement would have many benefits. First, it would provide a significant "success" that would raise the public profile of the CEC and prove its relevance to North Americans. Second, the issue of TEIA has particular relevance in the NAFTA/NAAEC context where the three Parties share borders of thousands of miles with activities in all three countries having transboundary impacts. An agreement among the Parties would provide an agreed method for analyzing those impacts.

We also recognize the vast amounts of work that the CEC put into this effort in the late 1990s. Because Article 10(7) of the NAAEC required the Parties to develop recommendations for a TEIA agreement, Council directed a course of work¹ that led the Secretariat to convene an experts group. That experts group prepared a draft TEIA agreement sensitive to the legal requirements for EIA in the three Party States. Council later specified that this agreement shall include, *inter alia*, "provisions on assessment of transboundary environmental impacts, notification to the potentially affected Party, consideration of mitigation measures, and public participation."²

We are also mindful that the TEIA negotiating agenda was moved to the Security and Prosperity Partnership (SPP) and hope that any effort to negotiate within the CEC is not duplicative of other efforts. In addition, Council in 1995 blocked efforts of the Secretariat to prepare case studies on TEIA because of the work within the SPP.³ We understand that the Parties have some disagreements over the scope of a trilateral TEIA agreement and that these disagreements may be one reason why TEIA negotiations have unfolded the way they have. Nonetheless, we continue to urge the U.S. government to find creative ways to overcome the differences that may still exist among the Parties. A series of case studies along the lines proposed by the Secretariat in August 2005 may be one way to bridge any remaining differences of opinion among the Parties.

Recommendations:

- 1. The NAC encourages the United States and Council to pursue negotiations to complete a Transboundary Environmental Impact Assessment (TEIA) agreement.***
- 2. To the extent that the Parties have concerns over specific aspects of a TEIA agreement, the NAC encourages the United States to ask the Secretariat to prepare case studies in TEIA, as was proposed in 1994.***

¹ Council Resolution 95-07 (October 13, 1995).

² Council Resolution 97-03 (June 12, 1997).

³ Council Resolution 05-07 (Aug. 13, 2005).

National Advisory Committee
To the U.S. Representative to the
Commission for Environmental Cooperation

**Advice 2009-8 (October 26, 2009): Response to EPA's
Proposal to Negotiate Procedures to Implement the Government-to-Government Sanctions
Process of Part 5 of the NAAEC**

The NAC strongly discourages the United States and Council from negotiating model rules for the implementation of Part Five of the NAAEC. These negotiations are not likely to provide a useful set of procedures for advancing the work of the Commission. First, the NAC does not believe that any Party will ever use the dispute settlement proceedings contained in Part Five. We note that the NAAEC and CAFTA include such provisions and no Party has ever used them or, to our knowledge, even considered using them. We also note that the Ten-Year Review Committee feared that the sanctions process would be counterproductive, recommending in 2004 that "the [NAAEC] Parties publicly commit to refrain from invoking [the dispute settlement provisions] for a period of 10 years."⁴

Second, we think the adoption of Model Rules for dispute settlement under Part Five may have a chilling effect on the Parties timely consideration of submissions under the Submissions for Environmental Matters. The Part Five sanctions process has cast a long shadow over the cooperative nature of the NAAEC and may have made the Parties extremely sensitive to the citizen submission procedure of Articles 14 and 15 for fear that an issue raised by a citizen could later become the subject of the more consequential governmental sanctions process.

However, we do appreciate the concern of the United States regarding enforcement. To that end, we think a better strategy for promoting enforcement of environmental law would be to review implementation of Articles 5, 6, and 7 of the NAAEC. Article 5(2) directs each Party to ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations. Article 6(2) further directs the Parties to ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations. Article 7 then directs each Party to ensure that its administrative, quasi-judicial and judicial proceedings referred to in Articles 5(2) and 6(2) are fair, open and equitable.

Analysis of each Party's laws would help inform citizens of the availability of remedies within their own jurisdictions. In doing so, the Parties may redirect the attention of citizens away from the controversial Part Five sanctions process and the citizen's submissions process of Articles 14 and 15 and toward domestic remedies

Recommendations:

- 1. The NAC recommends without qualification that the United States not seek the negotiation and adoption of model rules for dispute settlement under Part Five of the NAAEC.***
- 2. The NAC recommends that the United States seek analysis of implementation of Articles 5(2), 6(2), and 7 of the NAAEC concerning the availability of fair, open and equitable judicial, quasi-judicial or administrative enforcement proceedings.***

⁴ TEN-YEAR REVIEW COMMITTEE, TEN YEARS OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, 55 (June 15, 2004) [hereinafter TRAC].